

Tribal Shellfish Resource Management



A Skokomish tribal member picks oysters from a Hood Canal beach.

Introduction

Shellfish have been a mainstay of western Washington's Indian tribes for thousands of years. Clams, crab, oysters, shrimp, and many other species were readily available year 'round. The relative ease with which large amounts could be harvested, cured, and stored for later consumption made shellfish an important source of nutrition — nearly as important as salmon.

Shellfish remain important for subsistence, economic, and ceremonial purposes. With the rapid decline of many salmon stocks, due to habitat loss from western Washington's unrelenting growth in the human population, shellfish harvesting has become a major factor in tribal economies.

The tribes have also used shellfish in trade with the non-Indian population since the first white settlers came into the region 150 years ago. Newspaper accounts from the early days of the Washington Territory note Indians selling or trading fresh shellfish with settlers. Shellfish harvested by members of western Washington's Indian tribes is highly sought after throughout the United States and the Far East, and tribal representatives have gone on trade missions to China and other Pacific Rim nations where Pacific Northwest shellfish — in particular, geoduck — is in great demand. Trade with the Far East is growing in importance as the tribes struggle to achieve financial security through a natural resources-based economy.

Treaty Shellfish Rights

As with salmon, the tribes' guarantees to harvest shellfish lie within a series of treaties signed with representatives of the federal government in the mid-1850s. Language pertaining to tribal shellfish harvesting included this section:

“The right of taking fish at usual and accustomed grounds and stations is further secured to said Indians, in common with all citizens of the United States; and of erecting temporary houses for the purpose of curing; together with the privilege of hunting and gathering roots and berries on open and unclaimed lands. Provided, however, that they shall not take shell-fish from any beds staked or cultivated by citizens.”

(Treaty With The S'Klallam, Jan. 26, 1855)

In exchange for the peaceful settlement of what is today most of western Washington, the tribes reserved the right to continue to harvest finfish and shellfish at all of their usual and accustomed grounds and stations. The tribes were specifically excluded from harvesting shellfish from areas “staked or cultivated” by non-Indian citizens.

Soon after they were signed, the treaties were forgotten or ignored. The influx of non-Indian settlers into the region grew with each passing year, and the tribes were slowly excluded from their traditional shellfish and finfish harvest areas.

Tribal efforts to have the federal government's treaty promises kept began nearly a century ago when the United States Supreme Court ruled in [U.S. v. Winans](#) that where a treaty reserves the right to fish at all usual and accustomed places, the state may not preclude access to those places.

Sixty years later, the tribes were again preparing for battle in court. After many years of harassment, beatings and arrests for exercising their treaty-reserved rights, western Washington tribes took the State of Washington to federal court. In 1974, U.S. District Court Judge George Boldt ruled that the tribes had reserved the right to half of the harvestable salmon and steelhead in western Washington. The “Boldt Decision,” which was upheld by the U.S. Supreme Court, also re-established the tribes as co-managers of the salmon and steelhead – equal with the state.

The tribes became responsible for establishing fishing seasons, setting limits, and enforcing tribal fishing regulations. Professional biological staffs, enforcement officers, and managerial staff were assembled to ensure orderly, biologically-sound fisheries would occur. Beginning in the late 1970s, tribal and state staff have worked together to develop comprehensive fisheries regimes that ensure harvest opportunity for Indian and non-Indian alike, and also preserve the resource for generations to come.

It was in this new atmosphere of cooperative management that the tribes sought to restore their treaty-reserved rights to manage and harvest shellfish. Talks with their state counterparts began in the mid-1980s, but were unsuccessful. The tribes filed suit in federal court in 1989 to have their shellfish harvest rights restored. Years of additional negotiations between the tribes and the state couldn’t yield a settlement, and the issue went to trial in May 1994.

The Rafeedie Decision And Implementation Plan

Federal Circuit Court Judge Edward Rafeedie heard nearly three weeks of testimony from tribal elders, biologists, and treaty experts, as well as testimony from private property owners, non-Indian commercial shellfish growers, and state employees.

Tribal elders testified in court how their parents taught them to harvest clams, oysters, squid, octopus and barnacles from different areas. They testified of learning to dry clams and other seafood for later use.

“We never had to buy food. We got it off the beach. It was plentiful,” said Bea Charles, a Lower Elwha Klallam tribal elder.

“All young Nooksacks were taken to various places (to gather shellfish), from the Canadian border on south to Whidbey Island,” said Ivan George, a Nooksack tribal elder. “We went as often as necessary — maybe once a week or every two weeks — depending on our needs and what events came up. I have continued shellfishing as an adult — as much as I can. It’s mandatory in my diet,” he testified.

Tribal shellfish biologists and fishery managers testified about current harvest management activities, including all of the management planning that occurs prior to a shellfish harvest, as well as monitoring programs in place to ensure harvests are conducted properly.

As with the court battle to have their rights to salmon restored, the tribes’ arguments in the shellfish trial centered around the Stevens Treaties — specifically what the treaty language meant at the time.

As with the Boldt Decision two decades earlier, Rafeedie ruled that the treaties’ “in common” language meant that the tribes had reserved harvest rights. In this instance, the tribes reserved the right to harvest up to half of all shellfish from all of their usual and accustomed places, except those areas “staked or cultivated” by citizens.

“... In interpreting the shellfish proviso, the court must focus on what the Indians intended: The record unequivocally reflects the Indians’ insistence on reserving the right to fish as they always had, and the record is devoid of any objections or concern over their exclusion from ancient fisheries,” Rafeedie wrote in his decision.

“A treaty is not a grant of rights to the Indians, but a grant of rights from them” to white settlers, he wrote. Noting the “paternal pose” federal treaty negotiators took with the tribes, Judge Rafeedie wrote that the United States promised the tribes would have a permanent right to fish as they always had.

“This right was promised as a sacred entitlement, one which the United States had a moral obligation to protect. The court may not rewrite the treaties or interpret the treaties in a way contrary to settled law simply to avoid or minimize hardship to the public or to the intervenors (private property owners and commercial shellfish growers).”

All public and private tidelands within the case area are subject to treaty harvest, except for shellfish contained in artificially-created beds. Rafeedie’s decision requires harvesting tribes to follow several time, place and manner of harvest restrictions.

For example, accurate shellfish surveys must first be conducted, and the tribes must inform private property owners of their intent to survey or harvest well in advance. Harvesting can occur no more than five days per year on any given private beach with less than 200 feet of shoreline. Also, tribal shellfish harvesters can cross privately-owned uplands to reach shellfishing areas, but only if no water or public upland access is available.

The court’s ruling covers 15 tribes: Jamestown S’Klallam, Lower Elwha Klallam, Lummi, Makah, Muckleshoot, Nisqually, Nooksack, Port Gamble S’Klallam, Puyallup, Skokomish, Squaxin Island, Suquamish, Swinomish, Tulalip, and Upper Skagit.

Dispute Resolution

Rafeedie’s detailed implementation plan established a dispute resolution process through which any group could dispute any other group’s harvest plans. Each party to the case designates one person to sit on a “special master” panel from which a representative will be chosen at random to hear the dispute. The court will approve the persons to the panel, and each party can challenge the designees of the other parties if bias can be shown.

After hearing the evidence of the dispute, the special master will file a report with the court for a final decision.

The Appeals Process

Another step was taken in the court process May 5, 1997 when a U.S. Court of Appeals panel of three judges heard more than three hours of testimony and rebuttals from attorneys for the tribes, the United States, the State of Washington, commercial shellfish growers and private property owners. Each group was looking for changes in Rafeedie’s initial ruling and subsequent implementation plan.

The tribes and United States argued that Rafeedie’s limitations to accessing private tidelands for harvest, along with his definition of cultivated shellfish beds, were too restrictive and denied the tribes the ability to exercise their treaty-reserved harvest rights on too many beaches.

The tribes also argued that Judge Rafeedie’s requirement that the tribes primarily use water access to reach harvest sites on private tidelands would jeopardize the safety of tribal harvesters.

Judge Rafeedie’s definition of a “natural bed” was also challenged by the tribes. Rafeedie determined that one-half pound per square foot was the minimum density of manila clams necessary to establish the existence of a natural bed that could sustain commercial harvest. The tribes argued that the density provision was arbitrary, and that the actual density necessary for commercial harvest could be less.

The state, in an attempt to monopolize the lucrative deepwater shellfish market, argued that the tribes have the right to harvest only those species they harvested at treaty time, and at specific places. Commercial shellfish growers argued that any shellfish bed, whether a naturally occurring bed or not, was “staked or cultivated” if a grower did anything to improve the bed or simply marked the bed’s boundaries with stakes, rendering them off-limits to tribal harvesting.

With 1997 coming to a close, the appellate court had given no indication as to when a decision will be handed down.

The Era of Cooperation

Although various portions of Judge Rafeedie's decision and implementation plan are still being appealed by the parties, the tribes are fully involved in the management of their treaty-reserved resources. Tribal shellfish managers have developed harvest management and supplementation plans. Harvest data is being collected and shared with the state co-managers.

One of the greatest positive steps in western Washington shellfish management occurred this past summer on a small beach along Hood Canal. It is one example of how tribes and individual tideland owners are cooperatively implementing Judge Rafeedie's decision.

In February 1997, a tidelands owner signed a shellfish management agreement with the Point No Point Treaty Council, a natural resources consortium representing the Skokomish, Port Gamble S'Klallam, Jamestown S'Klallam, and Lower Elwha Klallam tribes. The agreement included provisions for population surveys, harvest planning and potential cooperative enhancement activities.

In August, three Skokomish tribal members harvested about 100 dozen oysters from the tideland owner's beach under the supervision of the tribe's fisheries manager and tideland owner's family. The oysters were bound for a picnic celebration to honor the tribe's elders. The property owner later remarked that he couldn't tell that a single oyster had been harvested from his beach. He also expressed an interest re-establishing beds of Olympia oysters — the only oyster native to western Washington — on his tidelands for both personal and tribal harvest.

The agreement and subsequent tribal harvest are models of cooperation that can be emulated throughout western Washington. The tideland owner has lobbied neighboring beachfront owners to follow his lead and develop harvest management agreements.

Similar shellfish management agreements are being cooperatively developed between tribes and private tidelands owners in other regions of western Washington.

Public Health

Shellfish growing areas are routinely surveyed for current or potential pollution impacts, and are classified based on the survey information. No shellfish harvesting is allowed on beaches that have not been certified by the tribes and the Washington Department of Health. Growing areas are regularly monitored for water quality status and naturally-occurring biotoxins to protect the public health.

The tribes and state have developed a cooperative program designed to protect the shellfish consuming public from contaminated shellfish. The shellfish sanitation agreement, which was approved by Judge Rafeedie, ensures that all shellfish harvested within the State of Washington meets federal public health standards.

Conclusion

The future of western Washington's thriving shellfish resources relies upon cooperative management between the tribes and their state counterparts. The tribes' long-standing conservation ethic encourages everyone to take only what is needed, and to protect the environment so that all may share in this and other natural resources.

For More Information

For more information about the natural resource management activities of the treaty Indian tribes in western Washington, contact the Northwest Indian Fisheries commission, 6730 Martin Way E., Olympia, WA, 98516; or call (360) 438-1180. The NWIFC home page is available on the World Wide Web at <http://mako.nwifc.wa.gov>.